No. 80-1084

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In the Supreme Court of the United States

OCTOBER TERM, 1980

MOUNTAIN STATES LEGAL FOUNDATION, ET AL., PETITIONERS

v.

DOUGLAS M. COSTLE, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the EPA Administrator's final approval of the Colorado air quality standard state implementation plan (SIP) has mooted petitioners' challenge to the conditional approval that the Secretary had previously granted.

2. Whether the court of appeals erred in holding that petitioners lacked standing to challenge the Administrator's conditional approval of the Colorado SIP.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 630 F. 2d 754.

STATEMENT

1a. Under Section 109 of the Clean Air Act , 42 U.S.C. 1857c-4, the Administrator of the Environmental Protection Agency (EPA) is responsible for establishing two sets of nationwide ambient air quality standards. The "primary" ambient standards[1] for each designated pollutant, designed to protect the public health, were to be

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[1]Secondary standards were to be met within "a reasonable time." 42 U.S.C. 1857c-5(a)(2)(A)(ii).

achieved no later than 1975. 42 U.S.C. 1857c-5(a)(2)(A)(i); see *Train* v. *National Resources Defense Council, Inc.*, 421 U.S.C. 60, 64-67 (1975). Each state was required to submit to the Administrator for approval a state implementation plan (SIP) for "implementation, maintenance, and enforcement" of the air quality standards for every portion of the state. 42 U.S.C. 1857c-5(a)(1). If the Administrator found the plan inadequate, or if the state declined to submit a plan, the Administrator ultimately was required to promulgate a federal plan for the state.42 U.S.C. 1857c-5(c). Each SIP must include emission limitations for stationary pollution sources, schedules for compliance, and provisions for such additional methods of pollution control as are necessary. The Act also provides that each SIP must include measures designed to reduce pollution from motor vehicles, including automobile inspection and maintenance ("I/M"), and other trnasportation control programs if necessary to insure attainment and maintenance of the national standards. 42 U.S.C. 1857c-5(a)(2)(B) and (G).[2]

b. By 1976, it had become clear that many areas of the country had failed to attain the primary ambient air quality standards by the 1975 statutory deadline. A then-existing EPA regulation, 40 C.F.R. 51.18(b) (1976), on its face prohibited construction of any major source of pollution in any area in which the standards for any pollutant generated by the source were not being met. EPA modified this posi-

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[2]These latter provisions tie into another key aspect of the Act. In Section 202(b), 42 U.S.C. 1857f-1(b), Congress established tailpipe emission standards for new motor vehicles manufactured after certain dates. These standards required substantial reductions in carbon monoxide, hydrocarbon, and nitrogen oxide vehicle emissions. The scheme is further supplemented by EPA's program requiring the marketing of lead free gasoline to protect the catalytic converters installed in late model cars. 42 U.S.C. 1857f-6c; 40 C.F.R. Part 80; see *Amoco Oil Co.* v. *EPA*, 501 F. 2d 722 (D.C. Cir. 1974).

tion by publication of an interpretative rule on December 21, 1976, construing that regulation to permit certain major sources of pollution to be put into operation in nonattainment areas in certain situations. 41 Fed. Reg. 55524-55530 (1976); 40 C.F.R. Part 51 (1976). Under the interpretative rule, known as the "emission offset" ruling, a new source was permitted if emissions from existing sources were to be reduced by an amount greater than the incremental increase in pollution from the new source, if the new source was held to the lowest achievable rate of emissions, and if the applicant for the permit owned no other source that violated the applicable SIP. EPA also requested the states to develop revised SIP strategies for areas in which the air quality standards were not being met. See 41 Fed. Reg. 28600 (1976).

c. In the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 746-751, Congress added a new Part D to Title I of the Act (42 U.S.C. (Supp. III) 7501-7508) applicable to "nonattainment areas" in which national ambient air quality standards had not been met. Under Part D, the deadlines for attainment of the primary ambient air quality standards for most pollutants were extended until December 31, 1982. To ensure that these new deadlines would be met, Congress required that states submit to EPA substantially revised SIP's for nonattainment areas by January 1, 1979. Clean Air Act Amendments of 1977, Section 129(c), 42 U.S.C. (Supp. III) 7502 note. If these revisions met the requirements of the Act, they were to be approved by EPA by July 1, 1979.

Congress was also concerned that new sources not be constructed in nonattainment areas in a manner that would exacerbate existing violations while the states were formulating their revised plans. Therefore, Congress expressly ratified EPA's emission offset ruling, but directed that it be applied only until July 1, 1979. Section 129(a)(1) of the 1977 Amendments, 42 U.S.C. (Supp. III) 7502 note. For later

periods, Congress required each state to include in its SIP, by August 1978,[3] a provision imposing a limited moratorium on construction or modifications of major stationary sources after July 1, 1979. The moratorium was to affect only sources that would emit 100 tons or more per year of a pollutant for which the national ambient air quality standard was being violated in a particular area, and it was to operate only until a revised SIP complying with the provisions of Part D was approved or promulgated by EPA. See 42 U.S.C. (Supp. III) 7410(a)(2)(I).

Widespread failure to attain air quality standards by 1975 for pollutants generated primarily by automobiles, such as carbon monoxide and photochemical oxidants (ozone), posed a special problem. In 1977, therefore, Congress authorized EPA to grant limited extensions, until December 31, 1987, for meeting these two standards. 42 U.S.C. (Supp. III) 7502(a)(2). To minimize adverse health effects, however, Congress required that any state receiving such an extension must include an enforceable automobile inspection and maintenance (I/M) program in its revised SIP and implement this program "as expeditiously as practicable," but no later than 1982. 42 U.S.C. (Supp. III) 7502(b)(2), 7502(b)(10) and 7502(b)(11)(B). See H.R. Rep. No. 95-294, 95th Cong., 1st Sess. (1977).

Congress was aware that many states had yet to adopt transportation control measures, including I/M, and that this problem had generated considerable litigation. See H.R. Rep. No. 95-294, *supra*, at 286-291.[4] Prompted by

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[3]This date is established by Section 406(d)(2) of the 1977 Amendments, 42 U.S.C. (Supp. III) 7401 note.

[4]In 1974, acting pursuant to a court order in *National Resources Defense Council, Inc.* v. *EPA*, 475 F. 2d 968 (D.C. Cir. 1973), the Administrator required states needing transportation control plans to amend their SIPs to include such plans. 38 Fed. Reg. 2194 (1973). When several states failed or refused to adopt these amendments, the Administrator promulgated federal transportation control plans

suggestions in several of the relevant court decisions that withholding of federal funds would be a both useful and constitutionally permissible incentive for state participation,[5] Congress conditioned certain federal grants upon a state's satisfactory participation in the SIP program. Under 42 U.S.C. (Supp. III) 7506(a), where transportation control measures are needed, the revised SIP has not been approved by July 1, 1979, and reasonable efforts to submit such an SIP have not been made, EPA "shall not approve" grants otherwise authorized by the Clean Air Act, and the Secretary of Transportation shall not award certain highway grants. In addition, under 42 U.S.C. (Supp. III) 7616(b), grants for sewage treatment works may be withheld or restricted if the state does not have an approved SIP which accounts for the increases in air pollution caused by the sewage works or the residential, commercial, or vehicular growth made possible by the sewage works.

d. Many states that had nonattainment areas did not submit revised SIPs to EPA by July 1, 1979. Some of these

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for those states, including an inspection and maintenance program for motor vehicles, and he ordered the states to adopt implementing legislation. Several states challenged EPA's authority under the Clean Air Act and the Constitution to adopt such transportation measures. See, *e.g.*, *Brown* v. *EPA*, 521 F. 2d 827 (9th Cir. 1975) (*Brown I*); *State of Maryland* v. *EPA*, 530 F. 2d 215 (4th Cir. 1975); *District of Columbia* v. *Train*, 521 F. 2d 971 (D.C. Cir. 1975). These cases were vacated and remanded by this Court as moot after EPA conceded that the federal regulations had to be modified to remove the requirement that the state adopt implementing laws. *EPA* v. *Brown*, 431 U.S. 99 (1977). Thereafter, the Ninth Circuit again held that EPA lacked statutory authority under the Act to bring enforcement actions against the states for failure to implement the federally promulgated SIP requirements involved in this case. *Brown* v. *EPA*, 566 F. 2d 665 (9th Cir. 1977) (*Brown II*).

[5]See, *e.g.*, *Brown I*, *supra*, 521 F. 2d at 840; *State of Maryland* v. *EPA*, *supra*, 530 F. 2d at 228.

states, including Colorado, had not adopted special provisions in their existing SIPs imposing the required construction moratorium in the nonattainment areas of each noncomplying state. See 42 U.S.C. (Supp. III) 7410(a)(2)(I). On July 2, 1979, therefore, the Administrator, acting pursuant to 42 U.S.C. (Supp. III) 7410(c) and 7601, promulgated an interpretative rule that implemented the operation of the required moratorium in the nonattainment areas of each noncomplying state.

2. Because certain areas in Colorado had been designated as nonattainment areas for carbon monoxide and photochemical oxidants (43 Fed. Reg. 8975-8976, 40419 (1978)), the State of Colorado, if it desired to avoid the funding limitations, needed to develop for these nonattainment areas a new Part D SIP under 42 U.S.C. (Supp. III) 7502(b), which would include certain new measures such as legislation requiring that vehicle emissions be tested. On June 8, 1979, the Colorado legislature amended Senate Bill 1, a statute concerning inspection and maintenance. The law authorized a study to compare the effectiveness of two alternative programs: (1) a full I/M program to test emissions, and (2) a program requiring only that certain engine adjustments be made on all vehicles. The Colorado statute further provided that the study would have to be completed by January 1, 1980, and that the legislature would enact further legislation based on the results of the study, not later than March 1, 1980.

On October 5, 1979, the Administrator approved Colorado's SIP on the condition, among others, that the legislature adopt an acceptable I/M program by March 1, 1980, the deadline that the Colorado legislature had previously imposed upon itself. 44 Fed. Reg. 57401-57409 (1979). The Administrator's approval of the SIP lifted the moratorium on the construction of major sources that had become effective in certain areas of Colorado on July 2, 1976. However, the Administrator's conditional approval stated that

the SIP would ultimately be disapproved if the legislature failed to adopt an acceptable I/M by its self-imposed March 1, 1980 deadline. The Administrator also pointed out that the moratorium on construction of major new or modified stationary sources would again become effective in each nonattainment area under 42 U.S.C. (Supp. III) 7410(a)(2)(I), and that he would exercise his authority to withhold federal highway and sewage funds under 42 U.S.C. (Supp. III) 7506(a) and 7616(b), if the deadline were not met.

On December 4, 1979, a petition for review challenging the Administrator's conditional approval of the Colorado SIP was filed in the United States Court of Appeals for the Tenth Circuit by petitioners Mountain States Legal Foundation ("Foundation") and 27 individual members of the Colorado General Assembly.[6] Essentially, they claimed that the Administrator's conditional approval violated the First, Fifth, and Tenth Amendments, as well as Article IV, Section 4, of the Constitution, allegedly because the Administrator was coercing the state legislature to adopt an I/M bill. Petitioners also asserted that the Administrator had exceeded his statutory authority under the Clean Air Act. The State of Colorado intervened, through its Attorney General, and took the position that the Administrator had not violated the Clean Air Act, that the construction moratorium and funding cutoff provisions of the Act did not violate the First, Fifth, or Tenth Amendments and, finally, that Foundation had no standing to represent the State of Colorado.

The Colorado legislature failed to meet its March 1, 1980 deadline for passing an I/M bill. On March 1, 1980, therefore, the Administrator informed the court of appeals that

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[6]Petitioner Foundation seeks review here on behalf of its members who are citizens of the State of Colorado and on behalf of the State of Colorado (Pet. iii).

he had reinstated the construction moratorium in Colorado's nonattainment areas, and that he would proceed to withhold highway and sewage funds. Petitioners moved for a stay pending review,[7] which the Tenth Circuit granted at oral argument on March 13, 1980. The State of Colorado, through its Attorney General, both in its brief and at oral argument, expressly disclaimed any agreement with the constitutional and statutory challenges raised by Foundation and the 27 individual petitioners (Pet. App. 6a-7a). The Attorney General argued only that the Administrator's action would be arbitrary and capricious if he were to impose the funding restrictions before the final adjournment of the 1980 legislative session because the legislature "was making reasonable efforts to cure the deficiencies" (*id.* at 7a).

On May 2, 1980, the stay entered by the court of appeals expired according to its terms, and the construction moratorium again became effective. A further stay was sought and denied at that time. On May 7, 1980, the Colorado legislature passed an I/M bill, which Governor Lamm signed into law on May 23, 1980. On May 15, 1980, the Administrator informed the court of appeals that he believed that the Colorado bill was adequate, and that he would shortly publish in the Federal Register a notice of proposed rulemaking approving the I/M legislation as part of the Colorado SIP. On May 29, 1980, the court of appeals, on its own motion, requested memoranda on the question of mootness. Pet. App. 7a. On June 13, 1980, the Administrator published a notice of proposed rulemaking (45 Fed. Reg. 40167), and, on July 16, 1980, he again conditionally approved the Colorado SIP, revoked the construction moratorium, and stated that funding cutoffs would not be pursued (45 Fed. Reg. 47682).

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[7]An earlier stay motion had been denied on January 7, 1980.

On August 29, 1980, the court of appeals dismissed the petition for review. The court held that only the Colorado Attorney General had standing to raise the issue that the Clean Air Act and the Administrator's actions were unconstitutionally coercive under the First, Fifth, and Tenth Amendments to the Constitution. Because the Attorney General had expressly declined to raise that issue, the court held that petitioners could not do so on behalf of the state (Pet. App. 27a-29a).

ARGUMENT

The petition for review, which was dismissed by the court of appeals, challenged agency action that has since been superseded. This case is therefore moot, and the petition for a writ of certiorari should be denied. Moreover, even if the case were not moot, the holding of the court of appeals that petitioners lacked standing would provide no basis for further review because that holding is correct and does not conflict with any decision of this Court or any other court of appeals.

1. The present case is clearly moot. Petitioners originally brought this administrative review action to challenge the Administrator's decision of October 5, 1979 to approve the Colorado SIP subject to the condition that Colorado enact an I/M bill prior to the March 1, 1980 deadline that the state had previously imposed upon itself in Senate Bill 1, which the legislature amended on June 8, 1979. The Administrator stated on October 5, 1979, that he would disapprove the SIP, withhold federal highway and sewage funds, and reimpose a moratorium on the construction of new sources, if the state did not act by March 1, 1980. Because Colorado did not meet that deadline, the Administrator took those steps on May 2, 1980. See pages 7-8, *supra*. One week later, Colorado adopted an I/M bill. On July 16, 1980, the Administrator approved the Colorado I/M plan, lifted the construction moratorium, and removed the possibility that

funds would be withheld. As the Administrator stated on July 16, 1980, his May 2, 1980 disapproval of the Colorado SIP had been superseded, and he therefore "remov[ed] the federal funding and stationary source construction restrictions" (45 Fed. Reg. 47684).

The Administrator's July 16, 1980 final action approving the Colorado I/M plan revoked his conditional approval action of October 5, 1979, which was the action that petitioners sought to have reviewed. Moreover, it was precisely the allegedly "coercive" nature of the Administrator's conditional action upon which petitioners based their constitutional and statutory challenges. When the State of Colorado enacted the I/M legislation that was signed by Governor Lamm on May 23, 1980, thereby providing the Administrator with a proper basis for granting final approval to this element of the SIP, the State of Colorado set in motion the chain of events that would necessarily moot this controversy. Because the Colorado I/M plan is now fully approved, there is no longer any "live controversy" between the parties concerning the constitutional or statutory validity of the Administrator's conditional approval. See *Sosna* v. *Iowa*, 419 U.S. 393 (1975); *Defunis* v. *Odegaard*, 416 U.S. 312 (1974). It is likewise clear that this case does not fall within the "capable of repetition yet evading review" exception to the mootness doctrine. If the State of Colorado had not adopted a proper I/M plan, the case would not be moot. Moreover, petitioners do not and cannot demonstrate that the issues which they seek to present would evade review if Colorado were to repeal its I/M legislation and the Administrator were again to exercise his statutory authority under 42 U.S.C. (Supp. III) 7410(a)(2)(I), 7506(a), and 7616(b). See *Weinstein* v. *Bradford*, 423 U.S. 147 (1975); *Sosna* v. *Iowa, supra*. If those events were to occur, petitioners could then invoke the jurisdiction of the federal courts and put forward their constitutional and statutory claims. In their present posture, however, petitioners seek

what clearly amounts to an advisory opinion, which this Court has no power to grant. See *EPA* v. *Brown*, 431 U.S. 99 (1977).

2. Contrary to petitioners' contention (Pet. 17-22), the court of appeals correctly held that only the State of Colorado had standing to assert that the Administrator's actions under the Clean Air Act violated the Tenth Amendment, and that this claim could not therefore be raised by Foundation and the 27 individual legislators who are petitioners here.[8]

The State of Colorado intervened in the court below, through its Attorney General, and took the position that neither the Clean Air Act nor the Administrator's actions under the Act violated the Constitution. The State of Colorado also took the position that, as a matter of state law, the Attorney General has the exclusive right to represent the state in actions to protect its interests. See *Gallagher* v. *Continental Insurance Co.*, 502 F. 2d 827 (10th Cir. 1974). As the court of appeals correctly observed (Pet. App. 19a), "the position of the State of Colorado is completely in contradiction to that of [Foundation] and the twenty seven [legislators] on the constitutional and statutory challenges raised by the petitioners." The court of appeals therefore held, as the State of Colorado had urged, that only the Attorney General could represent the state's interest, and that petitioners lacked standing to raise their asserted constitutional claims. *Lamm* v. *Volpe*, 449 F. 2d 1202 (10th Cir. 1971). Accord, *State of Texas* v. *EPA*, 499 F. 2d 289, 320 (5th Cir. 1974).[9] This holding clearly comports with this

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[8]Indeed, petitioners' recognition of this fact caused them to file this action not only on their own behalf, but also purportedly on behalf of the State of Colorado (see Pet. iii). Petitioners nonetheless declined to brief the standing question in the court of appeals. See Pet. App. 15a, 29a n.2.

[9]If the federal courts were to permit private parties to assert Tenth Amendment claims that a state has declined to raise, unnecessary

Court's longstanding concern that third parties not be given unlimited power to assert the rights of other parties, a concern that is directly at stake here because the state's exclusive legal representative has taken a position directly opposed to the stance petitioners advocate.

Petitioners also attack the Court's holding that they lacked standing to challenge the Administrator's action on grounds other than the Tenth Amendment. As the court of appeals observed, no aspect of the EPA action in disapproving the plan, withholding funds or imposing the moratorium constituted an injury that affected Foundation, its officers and members. Because petitioners' arguments were, in substance, all directed to the Administrator's allegedly unconstitutional actions that were "coercing" the State of Colorado into adopting an I/M bill, petitioners sought to stand in the shoes of the state. The Colorado Attorney General spoke for the state, however, and advanced a position directly contrary to that advanced by Foundation. Thus, the court below correctly held that

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friction between the states and the federal government would certainly be created. In the present case, for instance, petitioners originally asserted that the Administrator was unconstitutionally attempting to "coerce" the state into enacting certain legislation. At the time that this review action was filed, the State of Colorado, acting through its Attorney General, not only declined to support petitioners' contention, but explicitly repudiated it. In the interim, that legislation has passed the general assembly and has been signed into law by the governor. In the present posture of this case, therefore, petitioners' controversy is as much with the State of Colorado as it is with the Administrator. In support of their position, petitioners ask that the Court look to statements made by legislators during the debates preceding the enactment of the bill to determine their state of mind. Such an inquiry certainly constitutes a novel function for the federal courts to perform. Petitioners' "legislator standing" cases (Pet. 18-19) are simply inapposite because in none of those did the legislators seek to raise claims that are analogous in any way to those that petitioners seek to raise here. See *Goldwater* v. *Carter*, 444 U.S. 996 (1979). See also *National League of Cities* v. *Usery*, 426 U.S. 833, 836 n.7 (1976).

the "injuries" of which petitioners were complaining were not theirs to assert.

3. Petitioners also ask that the Court decide several constitutional and statutory issues that were not decided below because of the court's holding that petitioners lacked standing. Those issues are not now properly presented for review (see *EPA* v. *Brown*, 431 U.S. 99, 103-104 (1977)), and they lack merit in any event.

a. As we have shown (pages 7-9, *supra*), Colorado's enactment of the I/M bill led the Administrator to revoke the allegedly "coercive" requirements that petitioners challenged below, thereby mooting this case. No need exists, therefore, for this Court to consider the constitutional claims (Pet. 5-15) that petitioners would raise. We note, however, that these claims are insubstantial. Petitioners' reliance (Pet. 7-8) on *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), for instance, is inapposite because the construction moratorium does not entail regulation of any state function at all, much less "functions essential to separate independent existence" of the state. What is challenged here is simply direct regulation of private commerce, which is authorized by the Commerce Clause. Compare *National League of Cities* v. *Usery, supra*, 426 U.S. at 845, 852. Such "direct federal regulation by definition involves no intrusion on sovereignty what soever." *District of Columbia* v. *Train*, 521 F. 2d 971, 994 n.27 (D.C. Cir. 1975), vacated and remanded *sub nom. EPA* v. *Brown*, 431 U.S. 99 (1977); *Brown* v. *EPA*, 521 F. 2d 827, 840 (9th Cir. 1975), vacated and remanded, 431 U.S. 99 (1977), opinion on remand, 566 F. 2d 665 (9th Cir. 1977) (see pages 4-5, note 4, *supra*).[10] The

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[10]The *Brown* decisions of the court of appeals do not support petitioners' contentions. In the *Brown* cases, EPA claimed the authority to direct the state to take particular action and adopt particular state laws, and to enforce this authority in the courts through injunctive relief, imposition of a receivership on state functions, and contempt citations

court of appeals have uniformly sustained federal laws, passed under the Commerce power, which, like the Clean Air Act (see page 14, *infra*), allow the states to choose whether to participate in a federal regulatory scheme. See *e.g., Friends of the Earth* v. *Carey*, 552 F. 2d 25, 36-39 (2d Cir.), cert. denied, 434 U.S. 902 (1977). Petitioners' Tenth Amendment claim is therefore devoid of merit.

b. Petitioners' arguments concerning the alleged unconstitutionality of the limitations in 42 U.S.C. (Supp. III) 7506(a) and 7616 likewise fail to withstand scrutiny. This Court has repeatedly upheld the constitutionality of statutes conditioning the availability of federal grant funds upon state participation in related regulatory programs. *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127, 143-144 (1947); *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 589-591 (1937); see also *Fullilove* v. *Klutznick*, No. 78-1007 (July 2, 1980), slip op. 22 (plurality opinion).

c. Petitioners erroneously assert that the Administrator's actions under the Clean Air Act violate Article IV, Section 4 of the Constitution and the First Amendment. That part of petitioners' challenge which is based on the Guaranty Clause presents no justiciable question apart from their Tenth Amendment claims. *Baker* v. *Carr*, 369 U.S. 186, 224 (1962). Moreover, contrary to petitioners' assertion (Pet. 12-15), the Administrator's disapproval of the Colorado SIP plan and imposition of a construction moratorium did not chill the rights of free expression of members of the Colorado legislature or interfere with the First Amendment rights of citizens to petition for the redress of grievances, and the cases upon which petitioners rely do not remotely support their position. See *United States* v. *O'Brien*, 391 U.S. 366, 377 (1968).

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against state officials including the governor. Here, EPA has done none of these things and asserts no power to require Colorado to act at all. EPA has not, in fact, *required* Colorado to do anything.

5. Petitioners also raise a number of statutory claims that lack merit. They broadly assert that the Clean Air Act provides no support for the Administrator's imposition of a moratorium on the construction or modification of major pollution-emitting sources in nonattainment areas after July 1, 1979, because a revised SIP has not been approved by the Administrator.[11] However, 42 U.S.C. (Supp. III) 7410(a)(2)(I), 42 U.S.C. (Supp. III) 7413(a)(5), and 42 U.S.C. (Supp. III) 7502(a)(1) all provide direct support for the Administrator's interpretation of his powers under the Act. Furthermore, the legislative history of these sections demonstrates the statutory basis for imposing such a moratorium. S. Rep. No. 95-127, 95th Cong., 1st Sess. 163-170 (1977). H.R. Conf. Rep. No. 95-564, 95th Cong., 1st Sess. 157 (1977).

Petitioners contend that the Administrator lacked statutory authority to withhold federal highway funds if Colorado considered but failed to adopt an I/M bill. This claim is both moot and without substance. 42 U.S.C. (Supp. III) 7506(a) was intended by Congress to induce states to participate in the SIP program and to take such necessary steps as passing I/M legislation. This provision would be nullified if a state could avoid a federal fund cutoff by simply considering an I/M provision, without ever enacting one.

Petitioners further argue that Congress did not grant the Administrator the authority to withhold sewage funds if a state fails to adopt I/M legislation. However, 42 U.S.C. (Supp. III) 7616(b)(2) expressly authorizes the Administrator to withhold funds from sewage projects which would indirectly increase emissions from "mobile sources."

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[11] As we have shown (pages 9-11, *supra*), the moratorium has been lifted and the controversy with respect to the Administrator's authority is moot in any event.

In addition, petitioners err when they assert that the Administrator may not grant conditional approval for an SIP. Although the Administrator has now removed the conditions which petitioners challenged, petitioners also overlook the fact that 42 U.S.C. (Supp. III) 7601(a)(1) authorizes the Administrator to attach conditions to his approval. See *Friends of the Earth* v. *EPA*, 499 F. 2d 1118, 1124 (2d Cir. 1974).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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